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SUPREME COURT, U.S.

No. 81-6511

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

CHRISTINA COE and PEDRO DOE, on behalf of themselves and all other persons similarly situated,

Petitioners

v.

DAVID DINKINS, individually and as City Clerk of New York City, on behalf of himself and all town and city clerks in New York State, and DAVID AXELROD, individually and as New York State Commissioner of Health,

Respondents.

Reply Brief in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Cristina Coe and Pedro Doe respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit filed on January 11, 1982.

POINT I

THE PETITION SHOULD BE GRANTED BECAUSE IT RAISES IMPORTANT ISSUES OF FEDERAL LAW WHICH WERE PROPERLY RAISED IN THE COURT BELOW.

On the merits, the respondent's base their contention that this court should not grant Cristina and Pedro's petition on a statement in the case of Bellotti v. Baird, 443 U.S. 622, 637 (1979). The existence of such a statement is all the more reason for this court to grant the petition. Such a statement in a case is not made after full consideration of legal issues in the context of the factual situation of real people. The existence of a statement which prejudges a situation not fully presented to the court, violates the basic principle that a court should make a determination only when confronted with a real case or controversy. United States Constitution, Article III, Sec. 2.

The issue of the options constitutionally available to minors confronted with pregnancy and the responsibility for an infant are too important for the numerous individuals affected and this society as a whole to be resolved by anything less than full consideration by this court. Pregnancy and child bearing before an artificially designated age of majority is, always has been, and always will be a biological and social fact of life. This court has determined that minors have a constitutional right to choose abortion without parental notification or consent if they can demonstrate maturity or that their best interests would be served. Bellotti v. Baird, 443 U.S. 622 (1979); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976). The alternative to abortion now available to minors like Cristina and Pedro is to bear illegitimate children. Illegitimate status heaps a myriad of social and legal disabilitites upon both children and parents and imposes burdens on society as well. See Petition, pp. 9-12; Trimble v Gordon, 430 U.S. 762, 768-70 (1977); Weber v. Aetna Casualty and Surety Co.,

406 U.S. 164, 175-76 (1972); see U.S. Dept. of Health Education and Welfare, 92nd Cong., 1st Sess., Report on Services to AFDC Families 33-35 (Comm. Print 1971) in which the Department of Health Education and Welfare reported to Congress that illegitimate births contributed substantially to the size of the Aid to Families with Dependent Children program and that about half of all illegitimate births were to mothers under twenty years of age. Petitioners assert that this court should fully consider the availability of the option proposed by Cristina and Pedro and others like them; a chance to demonstrate the capacity for establishment of a legally sanctioned, traditional two parent family, marriage, self support and legitimacy.

The respondent attempts to justify denial of such an opportunity by arguing that a state may defer to parental control over children. Minors are not the property of their parents. Their lives are not subject to unlimited parental whim. Parental decisions which will jeopardize the well being of a minor or have a potential for significant social burdens are subject to limitation. Wisconsin v. Yoder, 406 U.S. 205, 233-34 (1972). See Parham v. J.R., 442 U.S. 584, 602, 606-607 in which this court denied parents "absolute and unreviewable discretion" and held that inquiry by a "neutral factfinder" was constitutionally required.

While advocating parental authority, the respondent ignores the fact that Cristina and Pedro are parents too, with responsibilities for the well being of an infant and that Pedro's mother and father who desired and consented to the marriage are also parents. This court has not resolved or given guidance on an issue, which the biological and social facts of life dictate must be decided; how should the interests of minor parents responsible for the care of an infant be balanced with the interests of the parents of those minors. This is a particularly important issue in this case since New York State disregards the interests and desires of other parents involved

and affords a one parent veto even to a parent who is insane or who, like Cristina's mother, refuses to live with, support or have any contact with her daughter.

Cristina and Pedro's plight is not an isolated or infrequent one. The district court below pointed out that in one year, in New York City alone, there were 32,000 pregnancies and over 10,000 out of wedlock births to women between fifteen and nineteen (Decision dated June 29, 1981, attached to Petition, Appendix C p. C-11). See Human Resources Administration, "Report of the HRA Ad Hoc Interagency Task Force on Adolescent Pregnancy" (December 1979). This court has recognized that the very existence of a pregnancy can fracture family structure and that parental authority is not enhanced by imposing parental veto power when the minor and the parent are fundamentally in conflict about what to do when confronted with the minor's pregnancy. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 75 (1976).

Cristina's situation presents the alternative to that presented in Planned Parenthood. Cristina's mother attempted to force her daughter to have an abortion over Cristina's strong objections and refused to give consent to marriage and legitimation of Cristina's child. Allowing the imposition of forced illegitimacy as a punishment for pregnancy or refusal to abort is just as perverse and irrational as imposing pregnancy as a punishment for fornication. See Carey v. Population Services International, 431 U.S. 678 (1977); Eisenstadt v. Baird, 465 U.S. 438 (1972).

Cristina and Pedro, as parents, do not assert that they should have predominance over the interests of their parents; they do not insist on an absolute right to marry. They assert only that as persons of an age at which New York State allows marriage, they have a right to be heard. They do not assert, as did the minors seeking abortion, that they only, and not their parents, should be heard. They ask only what New York affords those minors who circumvent its laws to marry;

a hearing before a neutral factfinder at which they and their parents have an opportunity to be heard on the issue of their capacity to marry and legitimate their child. Fundamental fairness will thus be guaranteed to the minor parents and their parents since procedural protections can be afforded to one party without derogating the substantive liberty of another. Smith v. Organization of Foster Families, 431 U.S. 816, 846 (1977); see Armstrong v. Manzo, 380 U.S. 545 (1965).

Petitioners as plaintiffs below consistently raised the issue that their Fourteenth Amendment rights to due process and equal protection were violated by New York state law in that they were denied any opportunity to present evidence of their capacity to marry and legitimate their children in an appropriate state forum. The district court clearly recognized that this was a primary issue* raised by plaintiffs. The district court stated

> Plaintiffs do not seek an order mandating their marriage. They seek only a determination that the parental consent requirement is unconstitutional so that they may present to the appropriate official the facts relevant to a determination of whether a marriage license should issue. (Opinion dated August 18, 1981, Appendix B to Petition, p. B-10.)

The Second Circuit's per curiam opinion also pointed out that the plaintiffs asserted "a deprivation of liberty guaranteed by the Due Process Clause of the Fourteenth Amendment ..." (Opinion dated January 11, 1982, Appendix A to Petition, p. A-4.) Contrary to the respondents' assertion, Cristina and Pedro argued to the Court of Appeals in both their main and reply briefs that under New York State law marriages of persons between fourteen and eighteen were not void and that New York State courts were charged with the responsibility of determining

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* Plaintiffs contended that their rights under the First, Fifth and Ninth Amendments to marry, legitimate their children and rear their children as they saw fit in a legally and socially sanctioned traditional two parent family are infringed. Further, their children's concomittant right to be legitimate and reared in a traditional family setting are violated. Also the rights of those parents who wished the minors to marry are thwarted by the one parent veto imposed by New York Domestic Relations Law.

the validity of the marriage of a minor who had circumvented New York law to marry and that the courts applied a maturity standard to such a determination. (Plaintiffs-Appellants Brief to the Second Circuit p. 35, Plaintiffs-Appellants Reply Brief to the Second Circuit pp. 6-7, 12-13, 19.) The statutes and cases cited were the same as those cited in the petition. Matturro v. Matturro, 281 A.D. 695, 117 N.Y.S.2d 523 (2d Dept. 1952); Brown v. Brown, 51 Misc.2d 839, 274 N.Y.S.2d 484 (Fam. Ct. N.Y. Co. 1966); Short v. Hotaling, 32 Misc.2d 933, 225 N.Y.S.2d 53 (Sup. Ct., Kings Co. 1962); Matturro v. Matturro, 111 N.Y.S.2d 533 (Sup. Ct., Westchester Co. 1952); Anonymous v. Anonymous, 176 Misc. 850, 29 N.Y.S.2d 331 (Fam. Ct., N.Y. Co. 1941); Magee v. Nealson, 108 Misc. 396, 177 N.Y.S. 517 (Sup. Ct., Steuben Co. 1919); Allerton v. Allerton, 104 Misc. 627, 172 N.Y.S. 152 (Sup. Ct., Wayne Co. 1918).

These cases clearly demonstrate that minors who circumvent New York law to marry by lying, running away to another state, etc. are afforded a hearing on their capacity to marry if their marriage is challenged. If a minor's circumvention of the law amounts to perjury, in the unlikely event s/he is prosecuted, the minor is given a separate hearing to determine criminal liability. The validity of the marriage is not affected and is given legal sanction and recognition by the State of New York. See cases above and N.Y. Domestic Relations Law §7.

From the inception of this case, petitioners pursued the claims of denial of due process and equal protection and requested the relief of a hearing at which they could present evidence to demonstrate their capacity to marry. In the question presented in their petition for certiorari, petitioners attempted to succinctly set forth their claims while including its terms and circumstances in as much detail as possible. Therefore, included in the question was the actual circumstance of New York law which had been argued to the court below, that minors who circumvent New York law to marry are afforded a

hearing on their capacity to marry. That this circumstance was included in the question does not change the basic due process and equal protection claim. Rather, it amplifies the egregious nature of the state's denial to minor law abiding parents like Cristina and Pedro of any opportunity to prove their capacity to marry.* Even if the petitioners had not pointed out to the court below or in their petition to this court the fact that New York State provides hearings on capacity to marry to minors who circumvented its law to marry, it would have been an issue fairly comprised in the petitioners' due process and equal protection claim to a hearing on capacity to marry. Supreme Court Rule 21.1(a); see Vance v. Tenazas, 444 U.S. 252, 258, note 5 (1980).

The kinds of issues the Supreme Court refuses to hear if not raised below are those which present separate and distinct questions far removed from the issues considered by the lower court. E.g., see, Singleton v. Wolf, 428 U.S. 106 (1976) in which the Supreme Court found that the Court of Appeals' resolution of the merits of a constitutional claim was inappropriate where the District Court had only issued a decision on the defendant's pre-answer motion to dismiss on the grounds of the plaintiffs' alleged lack of standing. But see Youakim v. Miller, 425 U.S. 231 (1976) in which the court considered the Supremacy Clause issue of whether a state statute conflicted with a federal statute when the only issue raised below was whether the state statute violated the Equal Protection Clause.

However, consideration of even questions not present in the petition for certiorari and not presented in the Court of Appeals is not beyond the Supreme Court's power and in appropriate circumstances the court has addressed them. Vance

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* Even if New York State did not afford hearings to minors who circumvent its law to marry, Cristina and Pedro would still have a valid due process and equal protection claim since their fundamental privacy right to freedom of choice in issues of family life is substantially infringed.

v. Tenazas, 444 U.S. 252, 258 note 5 (1980). A question of law will be considered even if not raised in either the Court of Appeals or the petition for certiorari if it is a "predicate to an intelligent resolution" of the question which was presented. Cuyler v. Sullivan, 446 U.S. 335, 342 note 6 (1980). At the very least, consideration of the fact that New York State provides minors who circumvent its laws a hearing on their capacity to mary is predicate to an intelligent resolution of whether the due process and equal protection rights of law abiding minors like Cristina and Pedro require a hearing on their capacity to marry and legitimate their child.

POINT II

THIS COURT SHOULD GRANT THE PETITION TO CONSIDER THE QUESTION OF WHETHER THE CLASS SHOULD INCLUDE ILLEGITIMATE CHILDREN WHOSE MINOR PARENTS HAVE BEEN DENIED ANY OPPORTUNITY TO DEMONSTRATE THEIR CAPACITY TO MARRY.

The interest of the infant children forced to bear the status of illegitimacy against their parents wishes should be fully considered in this case and they should therefore be included in the class represented before this court. Cristina and Pedro seek not only to represent the interests of minor parents who desire an opportunity to demonstate their capacity to marry but also their children forced into and burdened by the status of illegitimacy. The only way a child can be legitimate under New York State Law is if his parents marry. N.Y. Dom. Rel. Law §24 (McKinney 1977). It is indisputable that an illegitimate child would be better off socially and economically if legitimate. He would thus benefit from a process by which his parents could establish their capacity to marry when marriage is the only way the infant can be legitimated. Illegitimate children are disadvantaged. Illegitimate birth is a life long social stigma. New York State completely disregards the best interests of these innocent, helpless infants. The state allows each infant's present and future to depend solely

on the whim of one of his grandparents who has no responsibility for him. His parents, who care for and support him, are deprived of any opportunity to act in this best interests. Each infant has a constitutional interest in having some process by which his parents could demonstrate their sincere desire and capacity to marry and legitimate him.

Cristina and Pedro's child, Daniel, was not born when the class in this case was certified by the district court. His parents sought to marry before his birth so he would never have to be illegitimate. Cristina and Pedro are Daniel's guardians and as such can represent him and other infant children similarly situated in this case. Woe v. Matthews, 408 F. Supp. 419 (E.D.N.Y.) aff'd 512 F.2d 40 (2d Cir. 1977); Doe v. Lavine, 347 F. Supp. 357 (S.D.N.Y., 1972); Fed. Rl. Civ. Pro. 17(c).

Inclusion in the class of illegitimate infant children represented by Cristina and Pedro would satisfy the requirements of Fed. R. Civ. Pro. 23(a) and 23(b)(2). The constitutional claim presented on behalf of minor parents and their infant children is the same and Cristina and Pedro as parents advancing the same constitutional claim as their child will fairly and adequately protect the interests of all class members, parents and children alike. The claims of a representative and members of a putative class are typical if they arise, as they do here, from the same legal theory or if there is an absence of antagonism or conflicting interest between the class members. Jennings Oil Co., Inc. v. Mobil Oil Corp., 80 F.R.D. 124 (S.D.N.Y. 1978). Factual variation among class members does not destroy typicality. Leisner v. New York Telephone Co., 358 F. Supp. 359 (S.D.N.Y. 1973); Mendoza v. Lavine, 72 F.R.D. 520 (S.D.N.Y. 1976). Also the district court below found the numerousity requirement met, pointing out that there were over 10,000 out of wedlock children born in one year in New York City alone. (Opinion dated June 29, 1981, Appendix C to Petition, p. C-11). The respondents in refusing to grant

any opportunity for the interests of the minor parents and their children to be heard have acted on ground generally applicable to the class, and the relief, provision of such an opportunity, would be appropriate for the class as a whole, both children and parents.

In order to fully consider the impact of New York State Law and the interests of all involved this court should consider the inclusion in the class of the illegitimate children of minor parents.

CONCLUSION

For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted.*

Respectfully submitted

FRANK A. BRESS

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* Petitioners have submitted a Brief in Opposition to Respondents Cross-Petition which addressed the issues raised by respondents in their Cross-Petition and inappropriately in their Brief in Opposition to the Petition.

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AFFIDAVIT OF SERVICE

JANET CALVO hereby duly sworn deposes and says:

1. I am of counsel to Frank Bress, attorney for petitioners, cross-respondents in this case. My office is at 80 Fifth Avenue, Room 1501, New York, New York 10011.

2. On June 4, 1982, I served copies of the Reply Brief in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit by depositing the same in a United States Post Office mailbox with first class postage prepaid, addressed to:

a. Honorable Robert Abrams, Attorney General of the State of New York, Two World Trade Center, New York, New York 10047, Robert J. Schack of Counsel, attorney for David Axelrod and

b. F. Schwartz, Corporation Counsel of the City of New York, 100 Church Street, New York 10007, attorney for David Dinkins.

JANET CALVO

Sworn to before me this
4th day of June, 1982

Notary Public

FRANK A. BRESS
Notary Public, State of New York
No. 31-4512283
Qualified in New York County
Term Expires March 30, 1983